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McNally v. United States: Intangible Rights Mail Fraud Declared a Dead Letter

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McNALLY v. UNITED STATES: INTANGIBLE RIGHTS MAIL FRAUD DECLARED A DEAD LETTER

Congress enacted the federal mail fraud statute (mail fraud statute or Act)[1] in 1872,[2] during a period that witnessed a general expansion of federal authority into areas of the law previously within the sole jurisdiction of the states.[3] Despite the historical significance of the development of federal jurisdiction that the mail fraud statute represented, its legislative history is sparse.[4] The sponsor of the new act envisioned it as frustrating the fraudulent designs of "thieves, forgers, and rapscallions"[5] who effected their schemes by use of the federal mails. Beyond those remarks, however, neither more specific aims of the new law, nor relevant committee discussions, were recorded.

The Act originally proscribed the use of the mails to implement any "scheme or artifice to defraud,"[6] but did not remain long in this relatively

1. Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323 (codified as amended at 18 U.S.C. § 1341 (1982)) [hereinafter mail fraud statute or Act]. Section 1341 provides, in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . shall be fined . . . or imprisoned . . . .

Id.

2. Although part of a general recodification of the postal laws, § 301 was without legislative predecessor. Rakoff, *The Federal Mail Fraud Statute* (pt. 1), 18 DUQ. L. REV. 771, 779 (1980); Comment, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute,* 47 U. CHI. L. REV. 562, 567 (1980).

3. This Reconstruction Era expansion of both federal civil and criminal law in part was due to a proliferation of large scale swindles and frauds with which state authorities were unable to contend. *See* Rakoff, *supra* note 2, at 780.

4. Virtually every commentator to discuss the mail fraud statute agrees on this point. *See, e.g.,* Hurson, *Limiting the Federal Mail Fraud Statute-A Legislative Approach,* 20 AM. CRIM. L. REV. 423, 425-26 (1983); Morano, *The Mail Fraud Statute: A Procrustean Bed,* 14 J. MAR. L. REV. 45, 45 n.2 (1980); Rakoff, *supra* note 2, at 782-83; Note, *Survey of the Law of Mail Fraud,* 1975 U. ILL. L. REV. 237, 239 (1975).

5. CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870) (statement of Rep. Farnsworth).

6. The Act of June 8, 1872, ch. 335, § 301, 17 Stat. 323 (codified as amended at 18 U.S.C. § 1341 (1982)) provided, in relevant part:

> That if any person having devised or intending to devise any scheme or artifice to

simple form. In 1889, Congress engrafted a list of prohibited schemes onto the original language by using the disjunctive "or."[7] Thus, the revised act prohibited both schemes and artifices to defraud as well as certain named schemes or artifices to obtain money, including "sawdust swindles" and "counterfeit money fraud."[8]

Congress amended the statute again in 1909.[9] The vague prohibition of schemes and artifices to defraud remained, this time linked directly by the disjunctive "or" to the new phrase "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[10] Consequently, after the 1889 and 1909 revisions, the statute appeared to prohibit use of the mails in connection with two different activities: undefined schemes to defraud, or schemes to obtain money or property by fraud.[11] Clearly, these amendments enlarged the operation of the new law,[12] yet they passed through Congress without any illuminating legislative history.[13] Thus, the further expansion of a statute originally representing a novel ex-

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> defraud, or be effected by either opening or intending to open correspondence or communication with any other person . . . by means of the post-office establishment of the United States . . . shall, in and for executing such scheme or artifice (or attempting to do so), place any letter or packet in any post-office of the United States, or take or receive any therefrom, such person, so misusing the post-office establishment, shall be guilty of a misdemeanor . . . .

Id.

7. Act of Mar. 2, 1889, ch. 393, § 1, 25 Stat. 873 (codified as amended at 18 U.S.C. § 1341 (1982)). The amended act provided, in relevant part:

> If any person having devised or intending to devise any scheme or artifice to defraud, or to sell, dispose of, loan, exchange, alter, give away . . . or procure for unlawful use any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States . . . *or* . . . what is commonly called the "sawdust swindle," or "counterfeit money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "bills," "paper goods," "spurious Treasury notes," shall, in and for executing such scheme . . . place or cause to be placed, any letter . . . in any post-office . . . shall . . . be punishable by a fine . . . .

Id. (emphasis added).

8. *See id.*

9. The amended act provided, in relevant part: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . shall be fined . . . ." Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1130 (codified as amended at 18 U.S.C. § 1341 (1982)).

10. *See id.*

11. *See, e.g.*, United States v. Clapps, 732 F.2d 1148, 1152 (3d Cir.), *cert. denied*, 469 U.S. 1085 (1984); United States v. States, 488 F.2d 761, 764 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974). *But see* Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 298 (1956) (Frankfurter, J., dissenting) (statutory construction rules require that all parts of a statute be construed together, wherever possible).

12. *See* Rakoff, *supra* note 2, at 772-73.

13. *See id.* at 809 (1889 amendment); *id.* at 816 n.205 (1909 amendment).

tension of federal authority took place without recorded explanation.[14] However, even this early broadening of the statute's scope could not foreshadow modern developments in the law of mail fraud, which commentators suggest began about 1941.[15]

In that year, the United States Court of Appeals for the Fifth Circuit suggested in dicta[16] that the corruption of a public fiduciary constituted a scheme to defraud prohibited by the mail fraud statute.[17] The following year, the United States District Court for the District of Massachusetts similarly suggested, in dicta, that the corruption of a private fiduciary relationship was also a fraudulent act within the mail fraud statute.[18] Both cases implied that, even absent an acquisition of money or property,[19] the mere corruption of a fiduciary relationship, where a mailing was involved, constituted a scheme to defraud in violation of the mail fraud statute. Thus, the cornerstones of the doctrine of "intangible rights"[20] mail fraud were set.[21]

What followed was a gradual but dramatic judicial extension of the mail fraud statute as a proscription of both public and private sector intangible rights fraud.[22] Thus, a law of rather obscure origins and

14. This was not unusual for that time. The *United States Code Congressional and Administrative News,* for example, a major regular compilation of legislative histories and other congressional materials, was not even introduced until 1941.

15. *See, e.g.,* Coffee, *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics,* 19 AM. CRIM. L. REV. 117, 128-30 (1981); Hurson, *supra* note 4, at 428-30.

16. *See* Shushan v. United States, 117 F.2d 110, 115 (5th Cir. 1941), *cert. denied,* 313 U.S. 574 (1942).

17. *Id.*

18. *See* United States v. Procter & Gamble Co., 47 F. Supp. 676, 678 (D. Mass. 1942).

19. This aspect of both decisions is most provocative, because the mail fraud statute is in essence a false pretenses statute, and false pretenses is a crime that traditionally required that the victim sustain a loss of money or property. In this regard, see *infra* text accompanying notes 50-60.

20. Prosecutors in the United States Attorney's office in Chicago, while that office was directed by James R. Thompson, the present Governor of Illinois, apparently first coined the term "intangible rights." *See* Coyle, *U.S. Prosecutors Reel in Wake of Mail Fraud Ruling,* 9 Nat'l L.J., July 20, 1987, at 1, col. 1.

21. Courts upholding the intangible rights doctrine have relied on both *Proctor and Gamble* and *Shushan. See infra* notes 104-08, 141-47, and accompanying text.

22. So dramatic, in fact, that by 1987 every federal circuit in the country had considered and accepted the intangible rights theory. *See, e.g.,* United States v. Silvano, 812 F.2d 754, 758-59 (1st Cir. 1987); United States v. Gray, 790 F.2d 1290, 1294-95 (6th Cir. 1986), *rev'd sub nom.* McNally v. United States, 107 S. Ct. 2875 (1987); United States v. Girdner, 754 F.2d 877, 880 (10th Cir. 1985); United States v. Clapps, 732 F.2d 1148, 1152-53 (3d Cir.), *cert. denied,* 469 U.S. 1085 (1984); United States v. Scott, 701 F.2d 1340, 1343 (11th Cir.), *cert. denied,* 464 U.S. 856 (1983); United States v. Curry, 681 F.2d 406, 410-11 (5th Cir. 1982), *cert. denied,* 471 U.S. 1004 (1985); United States v. Bronston, 658 F.2d 920, 926 (2d Cir. 1981), *cert. denied,* 456 U.S. 915 (1982); United States v. Bohonus, 628 F.2d 1167, 1171-72 (9th Cir.), *cert. denied,* 447 U.S. 928 (1980); United States v. Diggs, 613 F.2d 988, 998 (D.C. Cir. 1979),

design[23] became a versatile prosecutorial weapon,[24] extremely popular with United States attorneys.[25] The general contours that the intangible rights doctrine ultimately assumed can be described simply: A public or private fiduciary who conducts a self-serving scheme, advanced by some incidental use of the mails, by refraining from disclosing material information, has committed mail fraud by depriving those who had trusted him of their intangible rights to his good and honest services. Under the pure intangible rights mail fraud doctrine, it was not necessary that those defrauded sustain a loss of money or property.[26]

This development did not go unnoticed. For years, commentators,[27] scholars,[28] and jurists[29] have questioned the legal validity of the doctrine. Finally, after repeatedly denying certiorari to affirmed mail fraud convictions,[30] the United States Supreme Court, in *McNally v. United States*,[31] decided whether the federal mail fraud statute criminalizes intangible rights

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cert. denied, 446 U.S. 982 (1980); United States v. Condolon, 600 F.2d 7, 8 (4th Cir. 1979); United States v. Bush, 522 F.2d 641, 646-47 (7th Cir. 1975), *cert. denied*, 424 U.S. 977 (1976); United States v. States, 488 F.2d 761, 764 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974).

23. *See supra* note 4 and accompanying text.

24. *See* United States v. Maze, 414 U.S. 395, 405-06 (1974) (Burger, C.J., dissenting) (mail fraud statute a stopgap device that contends with new frauds not otherwise covered by other, more particularized, statutes).

25. *See* Rakoff, *supra* note 2, at 771. Mr. Rakoff himself is a former United States attorney. He described the mail fraud statute with glib enthusiasm:

> To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45., our Louisville Slugger, our Cuisinart—and our true love. We may flirt with RICO, show off with 10b-5, and call the conspiracy statute "darling," but we always come home to the virtues of 18 U.S.C. § 1341, with its simplicity, adaptability, and comfortable familiarity.

Id. (footnotes omitted); *see also* Hurson, *supra* note 4, at 423 (advancing statistics in support of claim that the mail fraud statute has become the premier weapon in the Justice Department's battle against white collar crime).

26. *See, e.g., States*, 488 F.2d at 764; *accord* United States v. Weiss, 752 F.2d 777, 784 (2d Cir.), *cert. denied*, 474 U.S. 944 (1985).

27. *See, e.g.*, Comment, *supra* note 2, at 564; Comment, *Federal Prosecution of Elected State Officials for Mail Fraud: Creative Prosecution or an Affront to Federalism?*, 28 AM. U.L. REV. 63, 66-77 (1978).

28. *See* Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 234-42 (1985); Morano, *supra* note 4, at 76-81.

29. *See States*, 488 F.2d at 767 (Ross, J., concurring); *see also* United States v. Margiotta, 688 F.2d 108, 139-40 (2d Cir. 1982) (Winter, J., concurring in part and dissenting in part), *cert. denied*, 461 U.S. 913 (1983).

30. Virtually every defendant whose conviction for intangible rights mail fraud was affirmed at the federal appellate level requested certiorari. *See, e.g.*, United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983); United States v. States, 488 F.2d 761 (8th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974). Prior to McNally v. United States, 107 S. Ct. 2875 (1987), the Supreme Court denied all requests. *See, e.g., supra* note 22.

31. 107 S. Ct. 2875 (1987).

fraud. Reasoning that congressional intent behind the statute was arguable at best,[32] and applying the statutory construction rule of lenity,[33] the Court concluded that the mail fraud statute does not protect "the intangible rights of the citizenry to good government."[34]

Petitioners Charles McNally and James Gray participated in a simple kickback scheme. Gray and Howard "Sonny" Hunt[35] were officials in the Kentucky state democratic party. Hunt had authority over selecting the agencies through which the commonwealth would purchase its insurance.[36] Hunt arranged for the commonwealth to purchase its worker's compensation policies through one particular insurance agency.[37] In return, the agency agreed to dispense commissions on the account in excess of fifty thousand dollars to other companies Hunt designated.[38] The beneficiary companies included one that Gray and Hunt controlled,[39] and that McNally, a private individual, nominally owned. McNally also received additional excess commission payments at Hunt's direction.[40]

McNally and Gray were tried before the United States District Court for the Eastern District of Kentucky on charges of mail fraud and conspiracy.[41] The government argued, consonant with established intangible rights fraud principles, that the defendants had defrauded the government and citizenry of Kentucky of the good and honest services of their public servants.[42] The court accepted the theory and charged the jury that it need only find that the defendants exercised control over state insurance selection processes and that the defendants directed the payment of commissions to a company in which they held an undisclosed interest.[43] Based on those instructions, the jury convicted both men of mail fraud and conspiracy.[44] The United States Court of Appeals for the Sixth Circuit affirmed, citing with approval the

32. *Id.* at 2880.

33. *Id.* at 2881.

34. *Id.* at 2879.

35. Hunt pled guilty to a single count of intangible rights mail fraud. United States v. Gray, 790 F.2d 1290, 1292 (6th Cir. 1986), *rev'd sub nom.* McNally v. United States, 107 S. Ct. 2875 (1987).

36. *McNally,* 107 S. Ct. at 2877-78.

37. *Id.* at 2877.

38. *Id.*

39. In fact, the two organized Seton Investments, Inc. for the sole purpose of sharing in the profits generated by their illicit arrangement. *Id.* at 2878.

40. *Id.*

41. *Id.* at 2875.

42. *Id.* at 2878.

43. *Id.* at 2878-79.

44. *Id.*

intangible rights doctrine as articulated by other circuits.[45]

The United States Supreme Court reversed[46] and held that the district court's jury charge was erroneous because it permitted convictions for acts outside of the reach of the statute.[47] Justice Stevens wrote a four part dissent, parts one through three of which Justice O'Connor joined.[48] Justice Stevens contended that the mail fraud statute did indeed prohibit schemes involving only intangible rights fraud because Congress intended the statute to prevent abuse of the mails.[49]

This Note will examine the legal history relevant to the *McNally* decision, analyze the decision itself, and discuss its ramifications. Specifically, the Note first will review the enactment, substantive revisions, and early interpretations of the mail fraud statute. The Note then will chronicle the modern expansion of the doctrine of intangible rights mail fraud and review the antithetical rule of lenity. Against this background of mail fraud law, the Note will analyze *McNally* by juxtaposing the respective views of the majority and dissent. Predictions as to the decision's impact will follow. Finally, the Note will conclude that, although *McNally* invalidated a versatile prosecutorial theory, it admits the possibility that alternate theories will mitigate its impact. Consequently, *McNally* represents a practical compromise between the two extremes of distended federal criminal jurisdiction and federal powerlessness over corrupt fiduciaries.

I. INTANGIBLE RIGHTS MAIL FRAUD: BACKGROUND, DEVELOPMENT, AND THE COMPETING RULE OF LENITY

A. The Law of Fraud when Congress Enacted the Mail Fraud Statute

Fraud in nineteenth century American jurisprudence[50] was a creature of both the common law and statute,[51] manifest in various distinct crimes.[52] All such crimes of fraud were, in essence, crimes against property imple-

45. United States v. Gray, 790 F.2d 1290, 1294-95, 1298 (6th Cir. 1986), *rev'd sub nom.* McNally v. United States, 107 S. Ct. 2875 (1987).

46. A strong majority of seven, including Justice White, Chief Justice Rehnquist, and Justices Brennan, Marshall, Blackmun, Powell, and Scalia, voted for reversal. *McNally,* 107 S. Ct. at 2877.

47. *Id.* at 2882.

48. *Id.*

49. *Id.* at 2884-85 (Stevens, J., dissenting).

50. For a concise but thorough examination of this topic, see Comment, *supra* note 2, at 572-78.

51. *See id.* at 572.

52. Specifically, these crimes included embezzlement, false pretenses, forgery, and larceny by trick. *See id.* at 573. *See generally* W. LAFAVE & A. SCOTT, CRIMINAL LAW §§ 84-90, at 618-72 (1972).

mented through trickery or deceit.[53] One of these, false pretenses, consisted of three basic[54] elements: (1) specific intent to defraud, (2) the advancement of a false pretense, and (3) pursuant acquisition of money or property.[55]

Throughout the nineteenth century and into this century, nearly every court to consider the fraud of false pretenses adhered to the traditional requirement of an acquisition of money or property from the victim.[56] Although courts occasionally relaxed the requirement that the victim sustain an economic loss,[57] in every known case the victim nonetheless transferred money or property to the defendant.[58]

Congress enacted the mail fraud statute, and completed its substantive amendments, during this period.[59] In fact, the statute reads like, and has been treated as, a false pretenses statute.[60] Because it is unlikely that Congress disregarded the then current elements of a crime that it was prohibiting, it follows logically that, in enacting the mail fraud statute, Congress intended only that it protect property rights, rather than the relatively ethereal right to a fiduciary's uncompromised loyalty.[61]

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53. *See* Comment, *supra* note 2, at 573; *see also* Goldstein, *Conspiracy to Defraud the United States,* 68 YALE L.J. 405, 420 n.43 (1959) (common law fraud is the obtaining of property by deceitful or illegal practice).

54. For a more detailed breakdown of the elements of fraud as identified by various courts see Goldstein, *supra* note 53, at 420 n.43.

55. *See* Comment, *supra* note 2, at 574 n.71.

56. *Id.* at 574. *But see* Tyner v. United States, 23 App. D.C. 324, 362-63 (1904) (corrupt conduct by a postal official may cause "general damage" that is fraud in an "equitable" sense, even though it causes no pecuniary loss).

57. *See* People v. Bryant, 119 Cal. 595, 597, 51 P. 960, 961 (1898); LaMoyne v. State, 53 Tex. Crim. 221, 229, 111 S.W. 950, 953 (1908). In both cases, the defrauded victims sustained no actual economic loss, but the courts affirmed the convictions of both defendants because each had fraudulently induced their victims to part with money or property.

58. *See Bryant,* 119 Cal. at 596-97, 51 P. at 961; *LaMoyne,* 53 Tex. Crim. at 225-26, 111 S.W. at 951; *see also supra* note 57 and accompanying text.

59. *See* supra text accompanying notes 1-2; *see also infra* notes 62-93 and accompanying text.

60. *See* Comment, *supra* note 2, at 573-74.

61. Notwithstanding the solid authority behind this synopsis of the law of fraud when Congress enacted the mail fraud statute, the Seventh Circuit took a contrary position on the question shortly before *McNally* was decided. In United States v. Holzer, 816 F.2d 304 (7th Cir.), *vacated,* 108 S. Ct. 53 (1987), the court considered whether a judge commits mail fraud when he solicits loans from counsel for a party before him but conceals that information from opposing counsel and the public. *Id.* at 307. Answering in the affirmative, Judge Posner suggested that one is guilty of common law fraud simply by withholding material information in violation of a fiduciary duty. *Id.* at 307-08. Judge Posner cited no authority in support of his proposition but seemingly took it on faith that a fiduciary's simple nondisclosure of information, absent an acquisition of money or property, constituted common law fraud.

Nor does it follow that Judge Posner's view is supported, by analogy, by broad constructions of "to defraud" in federal conspiracy cases. In several such cases, see, e.g., Hammerschmidt v. United States, 265 U.S. 182 (1924); Haas v. Henkel, 216 U.S. 462 (1910); Curley v. United

B. Legislative History and Early Interpretations of the Mail Fraud Statute

1. The Statute's Enactment

Although congressional attempts to control the illicit use of the federal mails first crystallized in 1868,[62] Congress did not enact the lineal ancestor of the modern mail fraud statute until 1872.[63] The sponsor of the new legislation stated that it was needed "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country."[64]

This express legislative concern with preventing fraud assumed the shape of the statutory prohibition of any "scheme or artifice to defraud." But the Act further required that the fraudulent scheme be effected with an intent to use the mails and an actual use of them.[65] This dual proscription, of fraud

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States, 130 F. 1 (1st Cir. 1904), courts found fraud where no property rights deprivation had occurred. As the *Curley* court correctly recognized, however, such an expansive explication of fraud under the federal conspiracy statute (18 U.S.C. § 371 (1982), which makes it a crime to defraud the United States government in any manner) is justified by that statute's singular nature. *See Curley,* 130 F. at 6-10.

In *Curley,* the United States Court of Appeals for the First Circuit reviewed a conviction under the conspiracy statute where the fraudulent act involved no acquisition of money or property (James Michael Curley, not yet governor of Massachusetts, sat for a post office entrance exam under another man's name). The court noted that the word "defraud" as used in common law statutes that protected individual and community property rights referred to frauds of money and property. *Id.* at 6-7. The court added that such a statute, protecting only individual/community property rights, is "one thing," while a statute directed at protecting the government alone, "might be quite another." *Id.* at 7. Along these lines, the court reasoned further that the government may safeguard itself against acts that compromise only its operations by declaring such acts unlawful. *Id.* at 9. Then, following this reasoning to its logical conclusion, the court held that an act of fraud that merely impairs government operations without compromising property rights was within the conspiracy statute. *Id.* at 10.

The point of *Curley* is clear. A broad construction of the conspiracy statute is justified because the smooth administration of the government itself can be gravely disrupted by deceit whether or not the government is defrauded of money or property. Consequently, the *Hammerschmidt, Haas,* and *Curley* cases merely hold that the offense of defrauding the government requires no proof of a property loss, while they imply that that same requirement in the context of a law protecting individual property rights, like the mail fraud statute, remains appropriate. These cases, therefore, appear not to lend support to Judge Posner's view of common law fraud in general and mail fraud in particular.

In fact, the Supreme Court confirmed this reading of the law shortly after *McNally.* On appeal, the Court vacated defendant Holzer's conviction and remanded his case for further consideration in light of *McNally. See* Holzer v. United States, 108 S. Ct. 53, 53 (1987).

62. The "lottery law" of 1868 made it unlawful to use the mails to advance certain illegal lotteries and circulars. *See* Act of July 27, 1868, ch. 246, § 13, 15 Stat. 196; *see also* Rakoff, *supra* note 2, at 781-82.

63. *See supra* note 6 for the text of the amendment.

64. *See supra* note 5 and accompanying text.

65. *See supra* note 6; *see also* Stokes v. United States, 157 U.S. 187, 188-89 (1895) (mail

and mail misuse, imparted an inherent tension to the infant law, because it was unclear whether Congress was concerned with controlling fraud generally, or with preventing abuse of the postal system.[66] Not surprisingly, the scarcity of legislative history[67] did little to mitigate the statute's ambiguity, which soon thereafter became manifest in contradictory decisions by the lower federal courts.[68] The Supreme Court considered the Act twice in this early period, each time resolving only technical issues of procedure.[69]

2. The 1889 Amendment

In 1889, in response to judicial uncertainty,[70] Congress revised the original statute by engrafting onto it an itemized list of prohibited offenses.[71] This was done by adding the disjunctive "or," followed by the new language, several phrases after the phrase "any scheme or artifice to defraud."[72] The result was that, in addition to undefined schemes to defraud, the statute also expressly prohibited defined schemes of property fraud.[73] No legislative history accompanied this amendment,[74] and two Supreme Court decisions that soon followed indirectly offered contradictory interpretations of its effect.

In *Streep v. United States*,[75] the trial court convicted the defendant of one of the property crimes the mail fraud statute expressly prohibited, selling counterfeit money through the mails.[76] On appeal, he argued that the trial court's jury charge was erroneous because it did not require that the jury find a scheme to defraud in addition to a scheme to sell counterfeit obligations.[77] In rejecting his argument, the United States Supreme Court noted that the statute applies either to a scheme to defraud, or to a scheme to sell

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fraud consists of three elements: scheme to defraud, intent to implement scheme through the mails, and use of the mails).

66. *See* Rakoff, *supra* note 2, at 783-85.

67. *See supra* note 4 and accompanying text.

68. *See* Rakoff, *supra* note 2, at 790-806 (lower federal courts divided into two camps in construing mail fraud statute, broad and strict constructionist).

69. *See In re* Henry, 123 U.S. 372 (1889) (resolving question as to sentencing aspects of statute); United States v. Hess, 124 U.S. 483 (1888) (resolving question as to sufficiency of indictment).

70. *See* Rakoff, *supra* note 2, at 809.

71. *See supra* note 7 for the text of the amendment.

72. *Id.*

73. *Id.* In addition, Congress added the phrase "caused to be placed" to the language describing use of the mails in execution of the scheme. Thus, it no longer was necessary that the defendant himself place the letter in the mail, an indirect mailing sufficed. *Id.*

74. *See supra* notes 4, 14, and accompanying text.

75. 160 U.S. 128 (1895).

76. *Id.* at 132.

77. *Id.*

counterfeit money.[78] Beyond that, the Court did not elaborate.[79] Consequently, *Streep* implies that the 1889 revision prohibited two different types of crimes. However, the Court in no way conceptually distinguished the two proscribed schemes or otherwise suggested that one referred to crimes of property while the other did not.[80]

The following year, in *Durland v. United States,*[81] the Court confronted a case in which the defendant was charged with mail fraud for selling through the mails bogus bonds, none of which he intended to honor.[82] The question presented was whether the phrase "scheme or artifice to defraud" included frauds effected by false promises as to the future, or was limited to misrepresentations as to past or present facts.[83] The Court held that even fraudulent misrepresentations as to the future were proscribed schemes to defraud, and expressly refused to limit the use of the mail fraud statute to cases involving only misrepresentation of past or existing facts.[84] Because defendant Durland obtained money by his fraudulent acts,[85] the Court's holding implied that "schemes to defraud" broadly applies only in similar cases involving pure property rights fraud. The Court did not address, however, the amendment's grammatical separation of unidentified schemes to defraud from specific property crimes, leaving uncertainty as to whether the Court considered Durland's acquisition of money necessary to its conclusion.

3. The 1909 Amendment

In 1909, Congress again amended the mail fraud statute[86] by codifying the *Durland* conclusion that the law encompassed false promises in addition to misrepresentations as to past or existing facts.[87] However, the revision had an additional practical effect that the *Durland* Court apparently did not intend. The new statute retained and emphasized by rearrangement[88] the

78. *Id.* at 132-33.

79. *Id.*

80. In fact, the Court summarily dismissed the appellant's question in one paragraph. It seemed to view the argument as semantic only, a question of nomenclature rather than substance. *See id.*

81. 161 U.S. 306 (1896).

82. *Id.* at 312.

83. *Id.* at 313.

84. *Id.* at 313-14.

85. *Id.* at 312.

86. See *supra* note 9 for the text of the amendment.

87. Pearce, *Theft by False Promises,* 101 U. PA. L. REV. 967, 980 (1953) (concluding that the 1909 amendment codified *Durland*).

88. *Compare* the 1889 version, *supra* note 7, *with* this version, *supra* note 9. After 1909, the language referring to money or property followed directly after "or" rather than several clauses later, as in the 1889 version.

grammatical distinction between schemes to defraud and schemes to obtain money or property that the 1889 Amendment had first suggested. Thus, the first sentence of the statute prohibited "schemes or artifices to defraud *or* [schemes] to obtain money or property by means of false or fraudulent pretenses, representations, or promises."[89]

In addition, Congress deleted original language dictating that the proscribed schemes had to be "effected by opening or intending to open correspondence."[90] In this way, Congress discarded the element of scienter with respect to use of the mails required by the 1889 version.[91] The result was a streamlined law essentially stripped of language that originally had emphasized the federal aspect of the crime: misuse of the mails.[92] Therefore, it is not surprising that the statute received a jurisdictional challenge not long thereafter.[93]

In *Badders v. United States,*[94] the trial court convicted the defendant of using the mails for the purpose of executing an undisclosed scheme to defraud.[95] He challenged his conviction on the grounds that the amended law only incidentally implicated a federal concern—mail abuse—while regulating schemes that otherwise were beyond federal jurisdiction.[96] Justice Holmes, writing for a unanimous Court, flatly rejected the defendant's contention. After holding that Congress did have the right to regulate the "overt act" of posting a letter,[97] he added: "[Congress] may forbid any such [use of the mails] done in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not."[98] The *Badders* Court thus seemed to place its imprimatur on the mail fraud statute as an antifraud provision limited in scope only by federal definitions of public policy.[99] The *Badders* Court did not, however, directly construe the language

89. *See supra* note 9.

90. *Id.*

91. The Supreme Court acknowledged this change in United States v. Young, 232 U.S. 155, 161-62 (1914).

92. *See* Rakoff, *supra* note 2, at 816.

93. *See* Badders v. United States, 240 U.S. 391, 393 (1916).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* (citing *In re* Rapier, 143 U.S. 110, 134 (1891)); *cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 417 (1819) (relatively broad federal authority over the mails inferred from terse constitutional grant of postal power).

99. Although there is precedent at common law for the proposition that the law proscribes conduct tending only to corrupt the public morals, see Jones v. Randall, 98 Eng. Rep. 706, 707 (1774) (the law prohibits whatever is *bonos mores est decorum*), the Supreme Court recognized long before *Badders* that there are no common law crimes in federal jurisprudence. Schwartz, *Federal Criminal Jurisdiction and Prosecutors' Discretion,* 13 LAW & CONTEMP.

of the mail fraud statute or specifically define what constituted a "scheme or artifice to defraud."[100]

C. The Intangible Rights Doctrine

Although a form of intangible rights fraud is nearly as old as the mail fraud statute itself,[101] the more provocative doctrine of intangible rights mail fraud did not begin to take shape until about 1941.[102] From that point, it developed in two separate but parallel directions, private and public sector intangible rights mail fraud.[103]

1. Private Fiduciary Intangible Rights Mail Fraud

In *United States v. Procter & Gamble Co.*,[104] the government charged the defendant with mail fraud in connection with a scheme to bribe the employees of a competing business in exchange for trade secrets.[105] Unquestionably, the information that the defendant illicitly obtained had economic value.[106] In rejecting the defendant's contention that the government's indictment had failed to state an offense, however, the court made the unnecessary observation that one who purposefully induces a breach of the employer/employee relationship defrauds the employer of a "lawful right."[107] This early articulation of the theory of intangible rights mail fraud proved seminal,[108] but did not win immediate acceptance.

PROBS. 64, 64 (1948). Consequently, Justice Holmes' broad language, as well as similar proclamations in more recent mail fraud cases, *see, e.g.*, Blachly v. United States, 380 F.2d 665, 671 (1967) (stating that the law condemns conduct that fails to reflect "moral uprightness"), would seem to authorize an overextension of federal jurisdiction.

100. For a brief discussion in this regard, see Comment, *supra* note 2, at 580. After the 1909 Amendment, Congress amended the mail fraud statute three times. All three amendments were minor language revisions. *See* Act of June 25, 1948, ch. 645, § 1341, 62 Stat. 763, 763 (surplusage from 1889 version removed); Act of May 24, 1949, ch. 139, § 34, 63 Stat. 94, 94 ("dispose of" replaced "dispose or"); Postal Reorganization Act, Pub. L. No. 91-375, § 6(j)(11), 84 Stat. 719, 778 (1970) ("postal service" replaced "post office department").

101. *See, e.g.*, Haas v. Henkel, 216 U.S. 462, 479 (1910); Curley v. United States, 130 F. 1, 10-11 (1st Cir. 1904) (holding that "to defraud" under the conspiracy statute need not include an acquisition of money or property).

102. *See* Shushan v. United States, 117 F.2d 110, 115 (5th Cir.), *cert. denied*, 313 U.S. 574 (1941); United States v. Procter & Gamble, 47 F. Supp. 676, 678 (D. Mass. 1942).

103. For a brief discussion of this parallel development, see Hurson, *supra* note 4, at 428-31.

104. 47 F. Supp. 676 (D. Mass. 1942).

105. *Id.* at 678.

106. *Id.* at 679. The court expressly rejected the argument that the purloined secrets had no intrinsic value. *Id.*

107. *Id.* at 678.

108. Federal courts have relied on *Procter & Gamble* many times for the proposition that the mail fraud statute protects intangible rights. *See, e.g.*, United States v. States, 488 F.2d

In *Epstein v. United States,*[109] the codefendants, directors simultaneously of breweries and brewery supply companies that did business with each other, were charged with mail fraud.[110] The government's theory was that the defendants' undisclosed conflict defrauded the respective corporations.[111] The United States Court of Appeals for the Sixth Circuit held that the defendants' breach of fiduciary duty fell short of "actual" fraud.[112] The court reasoned that the defendants had contracted at arms length, that the agreements were mutually advantageous, and that they were made in good faith.[113] Having concluded that the defendants were guilty of no more than "constructive" fraud, the court reversed the convictions.[114]

Epstein, however, represented only a brief slowing of momentum for the private fiduciary intangible rights doctrine.[115] Beginning in 1973 and continuing through 1975, the United States Court of Appeals for the Seventh Circuit repeatedly outlined the contours of the doctrine; in the process, the court rejected the constructive fraud defense.[116]

In the first of these cases, *United States v. George,*[117] the defendant purchased cabinets for Zenith Radio Corporation.[118] In that capacity, he agreed with the cabinet supplier that he would refrain from soliciting other suppliers in exchange for a "kickback" payment of one dollar per cabinet.[119] After confirming the requisite use of the mails, the court concluded that the

761, 766 (8th Cir. 1973), *cert. denied,* 417 U.S. 909 (1974); United States v. Mandel, 415 F. Supp. 997, 1012 (D. Md. 1976), *rev'd on other grounds,* 591 F.2d 1347 (4th Cir.), *conviction aff'd in relevant part en banc,* 602 F.2d 653 (4th Cir. 1979) (per curiam), *cert. denied,* 445 U.S. 961 (1980).

109. 174 F.2d 754 (6th Cir. 1949).

110. *Id.* at 756.

111. *Id.* at 763.

112. *Id.* at 766-69.

113. *Id.* at 766-70.

114. *Id.* at 770. For a brief discussion of *Epstein* and the constructive fraud defense, see Morano, *supra* note 4, at 60-63.

115. The *Epstein* court was not, however, the last court to resist intangible rights mail fraud. In United States v. Kelem, 416 F.2d 346 (9th Cir. 1969), *cert. denied,* 397 U.S. 952 (1970), for example, the United States Court of Appeals for the Ninth Circuit noted in dicta that the mail fraud statute must be strictly construed so as to avoid extension of federal law beyond the limits Congress defined. *Id.* at 347.

116. *See* United States v. Bush, 522 F.2d 641, 648 (7th Cir. 1975), *cert. denied,* 424 U.S. 977 (1976); United States v. Keane, 522 F.2d 534, 544-45 (7th Cir. 1975), *cert. denied,* 424 U.S. 976 (1976); United States v. Bryza, 522 F.2d 414, 422 (7th Cir. 1975), *cert. denied,* 426 U.S. 912 (1976); United States v. Isaacs, 493 F.2d 1124, 1149-50 (7th Cir.), *cert. denied,* 417 U.S. 976 (1974); United States v. George, 477 F.2d 508, 512-13 (7th Cir.), *cert. denied,* 414 U.S. 827 (1973). For a discussion of each case, see Morano, *supra* note 4, at 65-71.

117. 477 F.2d at 508.

118. *Id.* at 509-10.

119. *Id.* at 510. The defendant's agreement directly contravened an express company conflict of interest policy. *Id.* at 511.

defendant's scheme defrauded Zenith of his loyal and faithful services.[120] The court reasoned that the defendant's failure to solicit competitive cabinet suppliers, and to inform Zenith that the supplier might accept a smaller profit, constituted a duplicitous compromise of Zenith's right to the defendant's loyal service.[121]

Two years later, in *United States v. Bryza,*[122] a similarly situated defendant also was convicted of intangible rights mail fraud.[123] Defendant Bryza was a purchasing agent for International Harvester Company.[124] In violation of the company's express conflict of interest policy, Bryza accepted kickbacks from several parts suppliers.[125] The *Bryza* court followed the reasoning of the *George* court in affirming the defendant's conviction.[126] Bryza's failure to disclose his interest in his corrupt arrangement, the court held, deprived International Harvester of the honest and faithful services of a fiduciary.[127] In both *George* and *Bryza*, the defendants raised, and the court rejected, the constructive fraud defense.[128]

In 1978, the United States Court of Appeals for the Ninth Circuit continued the intangible rights trend in a novel context. In *United States v. Louderman,*[129] the court affirmed the wire fraud[130] convictions of the operators of a collection agency.[131] The government's theory was that, by misrepresenting themselves over the telephone to debtors in order to obtain personal information, the defendants defrauded the debtors they pursued of intangible privacy rights.[132] The court agreed, and deemed the practice a proscribed scheme to defraud phone company patrons of their right to

120. *Id.* at 513-14.

121. *Id.*

122. 522 F.2d 414 (7th Cir. 1975), *cert. denied,* 426 U.S. 912 (1976).

123. *Id.* at 415-16.

124. *Id.* at 415.

125. *Id.* at 415-16.

126. *Id.* at 422. In fact, the *Bryza* court relied expressly on *George. Id.*

127. *Id.*

128. *See Bryza,* 522 F.2d at 422-23; United States v. George, 477 F.2d 508, 512 n.5 (7th Cir.), *cert. denied,* 414 U.S. 827 (1973).

129. 576 F.2d 1383 (9th Cir.), *cert. denied,* 439 U.S. 896 (1978).

130. The wire fraud statute is identical to the mail fraud statute, except for the requirement that the scheme to defraud be implemented by an interstate or international wire, rather than mail, communication. It provides, in relevant part: "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication . . . ." 18 U.S.C. § 1343 (1982). Not surprisingly, the courts have identically construed the wire fraud and mail fraud statutes. *See* Note, *Intra-Corporate Mail and Wire Fraud: Criminal Liability for Fiduciary Breach,* 94 YALE L.J. 1427, 1429 n.8 (1985).

131. *Louderman,* 576 F.2d at 1386.

132. *Id.* at 1387.

privacy.[133]

Juxtaposition of *Louderman* with *George* and *Bryza* illustrates the steady expansion of the intangible rights theory. The defendants in both *George* and *Bryza* violated express conflict of interest policies.[134] Further, in both *George* and *Bryza*, arguably the defendants defrauded their employers of money as well as the intangible interest in employee loyalty.[135] In *Louderman,* on the other hand, no prior relationship of any kind existed between the parties, and no property interests of any kind were compromised.[136]

These decisions constitute merely a representative sampling of a very broad category of similar cases recognizing private fiduciary intangible rights mail fraud.[137] In each case, contrary to traditional concepts of fraud,[138] and notwithstanding the absence of direct Supreme Court or common law precedent,[139] courts upheld mail fraud convictions of defendants who had obtained nothing of value from their "victims." Simultaneous with this development, courts employed the same reasoning and reached the same conclusions in the area of public fiduciary intangible rights mail fraud.[140]

2. *Public Fiduciary Intangible Rights Mail Fraud*

Commentators cite *Shushan v. United States,*[141] as initiating the modern development of intangible rights mail fraud by public fiduciaries.[142] The co-defendants in *Shushan*, including a member of a local parish levee board whose complicity was secured by a bribe, set up and executed a bond scheme

133. *Id.*

134. *See* United States v. Bryza, 522 F.2d 414, 420-21 (7th Cir. 1975), *cert. denied,* 426 U.S. 912 (1976); United States v. George, 477 F.2d 508, 510-11, 514 n.7 (7th Cir.), *cert. denied,* 414 U.S. 827 (1973).

135. For example, the one dollar kickback per cabinet in *George,* which the defendant pocketed, might well have translated into a reduced price for the defendant's company had there been no such deal. In *Bryza,* the same argument applies; the defendant pocketed what might otherwise have been a cost reduction for the employer.

136. *See supra* notes 129-33 and accompanying text. United States v. Condolon, 600 F.2d 7 (4th Cir. 1979), is a similar case. There, the defendant deprived women of their privacy by seducing them, through false promises of acting jobs, and delivering no services. *Id.* at 8. The court affirmed his wire fraud conviction. *Id.* at 9.

137. Prior commentators also have discussed these cases. *See, e.g.,* Hurson, *supra* note 4, at 429; Morano, *supra* note 4, at 65-67.

138. *See supra* notes 50-60 and accompanying text.

139. *Id.* Also, recall that *Procter & Gamble,* often cited as the first modern private fiduciary intangible rights mail fraud case, only articulated the doctrine in dicta in the context of a case involving a tangible property loss. United States v. Procter & Gamble, 47 F. Supp. 676, 678-79 (D. Mass. 1942).

140. *See infra* notes 141-71 and accompanying text.

141. 117 F.2d 110 (5th Cir.), *cert. denied,* 313 U.S. 574 (1941).

142. *See, e.g.,* Hurson, *supra* note 4, at 429-30; Comment, *supra* note 2, at 584-85.

through which they obtained usurious fees at the expense of the same board.[143] In holding the defendants guilty of mail fraud, the court noted first that the government charged the defendants with scheming to defraud the levee board of money.[144] At this point, a common law or even nineteenth century court probably would have found that the government had stated all elements of the crime of fraud, and affirmed on that basis.[145] In this case, however, the court grounded its decision on the theory that, by corrupting the fiduciary obligation the bribed board member owed to the board, the defendants deprived the public of its right to honest government.[146] This dicta ultimately assumed a life of its own as the holding of later cases.[147]

In 1969, another mail fraud case further defined the public fiduciary theory.[148] In *United States v. Faser,*[149] the defendant was the executive secretary of the Governor of Louisiana.[150] In exchange for bribes, the defendant directed the deposit of state funds to a particular bank.[151] The government's indictment sounded the traditional charge that the defendant defrauded the state of money and property.[152] The court essentially restated *Shushan,*[153] however, when it rationalized the defendant's conviction on the additional ground that a state employee could commit fraud in such a case simply by depriving the state of his loyal and faithful services.[154]

Four years later, in *United States v. States,*[155] the United States Court of Appeals for the Eighth Circuit elevated this fiduciary fraud rationale from dicta to holding.[156] In *States,* the court affirmed a mail fraud conviction

143. *Shushan,* 117 F.2d at 114-15.

144. *Id.*

145. *See supra* notes 50-60 and accompanying text (discussing nineteenth century definition of fraud).

146. *Shushan,* 117 F.2d at 115.

147. *See, e.g.,* United States v. Isaacs, 493 F.2d 1124, 1150 (7th Cir.), *cert. denied,* 417 U.S. 976 (1974); United States v. States, 488 F.2d 761, 766 (8th Cir. 1973), *cert. denied,* 417 U.S. 909 (1974).

148. *See* United States v. Faser, 303 F. Supp. 380 (E.D. La. 1969).

149. *Id.*

150. *Id.* at 382.

151. *Id.* at 381-82.

152. *Id.*

153. *See* Shushan v. United States, 117 F.2d 110 (5th Cir.), *cert. denied,* 313 U.S. 574 (1941); *see also supra* notes 143-46 and accompanying text.

154. *Faser,* 303 F. Supp. at 384-85. The court relied on Blachly v. United States, 380 F.2d 665, 671 (5th Cir. 1967) in this regard. *Faser,* 303 F. Supp. at 385.

155. 488 F.2d 761 (8th Cir. 1973), *cert. denied,* 417 U.S. 909 (1974).

156. Coffee, *supra* note 15, at 166 n.215, considers the *States* decision as the point after which broad acceptance of the intangible rights doctrine became manifest. However, at least one post-*States* court refused to accept the pure intangible rights theory. *See* United States v. Ballard, 663 F.2d 534, 540-41 (5th Cir. 1981), *modified on rehearing,* 680 F.2d 352 (5th Cir.

based on the defendants' participation in a ballot box stuffing scheme.[157] Citing the seminal *Procter & Gamble* and *Shushan* cases,[158] the court declared that the prohibition of "schemes or artifices to defraud" properly is considered independent of the "for obtaining money or property" phrase.[159] From there the court concluded that the defendant had committed such a fraud simply by depriving the citizens of Missouri and the Board of Election Commissioners of "intangible political and civil rights."[160]

After *States,* the pure intangible rights theory that that court had articulated gained wide acceptance.[161] For example, the theory supported widely publicized convictions of several powerful political figures.[162] One in particular merits discussion because it represents another growth marker beyond which the reach of the public fiduciary theory passed.

In *United States v. Margiotta,*[163] the United States Court of Appeals for the Second Circuit affirmed the mail fraud conviction of Joseph Margiotta, the Republican Party Chairman of both Nassau County, Long Island and the Town of Hempstead, Long Island.[164] Margiotta was a private individual, but he was intimately involved in local politics.[165] For years, he appointed local insurance agencies to secure insurance for the town and county.[166] In return, he directed commission payments to political associ-

1982). Another court limited the theory by finding no violation of the mail fraud statute where the defendant's acts did not injure the government that employed him and did not affect his performance as a state representative. *See* United States v. Rabbitt, 583 F.2d 1014, 1024-26 (8th Cir. 1978), *cert. denied,* 439 U.S. 1116 (1979).

157. *States,* 488 F.2d at 767.

158. *Id.* at 764.

159. *Id.*

160. *Id.* at 765. Thus, *States* departed altogether from the traditional requirement that a crime of false pretenses be attended by an acquisition of money or property, because, at common law, intangible civil rights had no intrinsic economic value. *Cf.* Carey v. Piphus, 435 U.S. 247, 258-59 (1978) (no analogue at common law for compensatory damage award due to deprivation of procedural due process).

161. *See* Coffee, *supra* note 15, at 166 n.215 (noting general acceptance of theory after *States*); *see also supra* note 22 and accompanying text (theory accepted by every federal circuit).

162. *See, e.g.,* United States v. Mandel, 591 F.2d 1347 (4th Cir.) (Governor of Maryland's conviction affirmed), *aff'd in relevant part on reh'g en banc,* 602 F.2d 653 (4th Cir. 1979) (per curiam), *cert. denied,* 445 U.S. 961 (1980); United States v. Isaacs, 493 F.2d 1124 (7th Cir.) (codefendant Otto Kerner was the former Governor of Illinois), *cert. denied,* 417 U.S. 976 (1974).

163. 688 F.2d 108 (2d Cir. 1982), *cert. denied,* 461 U.S. 913 (1983).

164. *Id.* at 113.

165. In fact, although Margiotta held no elective office, he maintained a political "stranglehold" over the respective governments of Nassau County and the Town of Hempstead. *Id.* at 122.

166. *Id.* at 113-14, 127.

ates.[167] The court reasoned that the defendant had involved himself in governmental affairs to such an extent as to justify recognition in his case of the duty of fiduciary responsibility formerly applied only in cases involving designated political officials.[168] Therefore, like actual public officials before him,[169] defendant Margiotta suffered affirmation of his conviction for depriving the citizens within his jurisdiction of his honest and faithful services.[170]

Margiotta disturbed some observers, who saw its broad interpretation of mail fraud as a blanket authorization for federal prosecutions limited only by the discretion and imagination of United States attorneys.[171] But *Margiotta* did not emerge from a vacuum. As the preceeding survey demonstrates, *Margiotta* represented a legal trend of nationwide proportions. Against the backdrop of this trend, consideration of the rule of lenity will place the *McNally* decision fully in context.

D. The Rule of Lenity

It cannot be gainsaid that the United States Supreme Court possesses the power to "say what the law is."[172] Nor can it be doubted that the Supreme Court has long and often held that, in exercising that power, it will strictly construe ambiguous[173] penal statutes.[174] This rule of lenity, as it is called, is most commonly applied where a federal penal statute criminalizes certain poorly defined conduct, and the question presented the court is whether the defendant's actions fall within that category of criminal conduct.[175]

Where such criminal conduct is defined sufficiently, however, and con-

167. *Id.* at 118-19, 127.

168. *Id.* at 121-22.

169. *Id.* at 121 (listing cases involving mail fraud convictions of public officials).

170. *Id.* at 113.

171. *See* Hurson, *supra* note 4, at 432, 436; *see also Margiotta,* 688 F.2d at 139 (Winter, J. concurring in part and dissenting in part). "The majority's use of mail fraud as a catch-all prohibition . . . creates a real danger of prosecutorial abuse for partisan political purposes." *Id.*

172. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *cf.* United States v. Kimbell Foods, 440 U.S. 715, 738 (1979) (Court's function is to put congressional policy into effect).

173. A genuine statutory ambiguity must precede application of this rule. *See, e.g.,* Huddleston v. United States, 415 U.S. 814, 831-32 (1974); Callanan v. United States, 364 U.S. 587, 596 (1961).

174. Dowling v. United States, 473 U.S. 207, 213-14 (1985) (quoting United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820)).

175. *See generally* Annotation, *Supreme Court's Views as to the "Rule of Lenity" in the Construction of Criminal Statutes,* 62 L. Ed. 2d 827 (1981). The judicial practice of strictly construing penal statutes began in England during the eighteenth century. At that time, a proliferation of crimes designated capital offenses by Parliament encouraged courts to read criminal laws very strictly, so as to save relatively minor offenders from the gallows. *See* Jeffries, *supra* note 28, at 198 n.23.

gressional purpose is clear, the rule of lenity will not frustrate that purpose.[176] Consequently, the Supreme Court has declined to apply the rule in several cases where, after an examination of the statute's language[177] and legislative history,[178] it found no genuine ambiguity.[179]

The rule of lenity is primarily informed[180] by the related doctrines of notice and separation of powers.[181] Where notice requires that penal laws clearly apprise the public of what acts are deemed criminal, the rule of lenity ensures that unclear laws operate very narrowly.[182] In the same way, where separation of powers deems lawmaking the responsibility of legislators and law interpreting that of the courts, the rule of lenity restrains courts from effectively reading unintended meaning into ambiguous statutes.[183] Although commentators had suggested the incongruity of the coexistence of the rule of lenity and intangible rights mail fraud,[184] the problem received no more than a nodding judicial acknowledgment[185] until it finally was taken up by the Supreme Court.

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176. *See Huddleston,* 415 U.S. at 832.

177. *See* Ford Motor Credit Co. v. Cenance, 452 U.S. 155, 158 n.3 (1981) (absent clear legislative intent, statutes interpreted according to the plain meaning of the language).

178. *See* Harrison v. Northern Trust Co., 317 U.S. 476, 479 (1943) (court may rely on legislative history in construing inexact statutes). *See generally* 73 AM. JUR. 2D *Statutes* §§ 294-306 (1974) (discussing rule of lenity and related principles of statutory construction).

179. *See, e.g.,* Perrin v. United States, 444 U.S. 37, 49-50 (1979) (Travel Act unambiguous as applied); United States v. Culbert, 435 U.S. 371, 379-80 (1978) (Hobbs Act unambiguous as applied).

180. In addition to the concepts of notice and separation of powers, discussed *infra* at notes 181-83 and accompanying text, the Supreme Court also has identified federalism as an underpin of the rule of lenity, because unbridled constructions of federal statutes could infringe upon the jurisdiction of state law. *See, e.g.,* United States v. Bass, 404 U.S. 336, 349 (1971).

181. *See* Jeffries, *supra* note 28, at 199-200. Jeffries notes that, in addition to these principles, respect for the "Rule of Law" also encourages jurists to exercise discretion in reviewing statutes. *Id.* at 212-22.

182. *Id.* at 205-12.

183. *Id.* at 202-05.

184. *See* Coffee, *The Metastasis of Mail Fraud: The Continuing Study of the "Evolution" of a White-Collar Crime,* 21 AM. CRIM. L. REV. 3, 5-7 (1983); *cf.* Comment, *supra* note 2, at 574 (implying that application of rule of lenity would be inconsistent with modern constructions of the mail fraud statute).

185. In United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982), *cert. denied,* 461 U.S. 913 (1983), for example, the majority recognized that a broad mail fraud rule could criminalize a large category of conduct, *id.* at 122, but then affirmed defendant Margiotta's conviction by giving the mail fraud statute "a more sweeping interpretation" than any other court before it. *Id.* at 139 (Winter, J., dissenting). Likewise, in United States v. States, 488 F.2d 761 (8th Cir. 1973), *cert. denied,* 417 U.S. 909 (1974), the fact that Judge Ross was troubled by the court's construction of the Mail Fraud Statute did not prevent him from concurring in the opinion. *See id.* at 767 (Ross, J., concurring).

II. *McNALLY v. UNITED STATES*: TWELVE CIRCUITS REVERSED

In *McNally v. United States*,[186] the United States Supreme Court directly construed the problematic language of the mail fraud statute for the first time.[187] Writing for the majority,[188] Justice White held that jury instructions that required no finding that the alleged victims of mail fraud were deprived of money, property, services due, or control over their money, erroneously permitted convictions for conduct beyond the scope of the mail fraud statute.[189] In short, the Court ruled that frauds by public officials compromising only intangible, that is, noneconomic rights, are not mail fraud.[190] By so holding, the Court resolved uncertainties as to the construction and operation of the statute that had lingered since its enactment.[191] At the same time, the Court reaffirmed the long-standing rule of lenity that the modern growth of intangible rights mail fraud had belied.[192]

Justice White focused first on the legislative history of the statute's enactment.[193] After noting the remarks of the Act's sponsor,[194] he concluded that the sparse legislative history indicated that the law was directed at protecting the public from schemes to obtain money or property.[195] Thus, Justice White forecast the Court's holding at the outset.

Justice White turned then to the Court's decision in *Durland v. United States*.[196] In his view, *Durland* simply held that the phrase "scheme or artifice to defraud" was to be construed broadly as to property rights fraud.[197] In this regard, Justice White noted that the *Durland* Court construed the mail fraud statute to reach not only schemes to defraud based on false representations as to the past or present, but also frauds effected by "suggestions and promises as to the future."[198]

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186. 107 S. Ct. 2875 (1987).

187. *Id.* at 2879-81. Though the Court had construed the statute generally before, *see* Durland v. United States, 161 U.S. 306 (1896); Streep v. United States, 160 U.S. 128 (1895), *McNally* is the first instance in which the Court conducted a focused examination of the statute's two core phrases.

188. Justice White was joined by Chief Justice Rehnquist and Justices Brennan, Marshall, Blackmun, Powell, and Scalia. *McNally*, 107 S. Ct. at 2877.

189. *Id.* at 2882.

190. *See id.* at 2879.

191. *See* Rakoff, *supra* note 2, at 790-806 (discussing widely divergent interpretations of the original mail fraud statute).

192. *See supra* note 184 and accompanying text.

193. *McNally*, 107 S. Ct. at 2879-80. *See generally supra* notes 62-68 and accompanying text.

194. *McNally*, 107 S. Ct. at 2879.

195. *Id.*

196. 161 U.S. 306 (1896); *see also supra* notes 81-85 and accompanying text.

197. *McNally*, 107 S. Ct. at 2879-80.

198. *Id.* at 2880 (quoting Durland v. United States, 161 U.S. 306, 313 (1896)).

From this position, Justice White reasoned that the 1909 codification of *Durland* further emphasized that Congress intended the statute to protect only property interests.[199] However, noting the disjunctive separation of the statutory prohibitions of schemes to defraud from schemes to obtain money or property, Justice White conceded the possibility that Congress intended that the two phrases be considered separately.[200] Consequently, he undertook a brief discussion of the verb "to defraud."[201]

In this regard, Justice White first stated that "to defraud" commonly means wronging one in a property right by depriving one of something of value by deceit.[202] Nothing about the 1909 amendment, he continued, indicated that Congress was ignoring that common understanding.[203] He concluded that Congress' addition of the second phrase ("or for obtaining money or property") only made it unmistakable that the law proscribed misrepresentations as to the future, in addition to other frauds of money or property.[204]

Justice White moved next to the rule of lenity.[205] In accord with that rule, he noted that harsh interpretations of criminal statutes are appropriate only where Congress has spoken clearly.[206] Then, suggesting that any other construction would only involve the federal government in setting disclosure and good government standards for state and local officials,[207] Justice White reiterated the Court's conclusion that the mail fraud statute protects only property rights.[208]

Justice Stevens, in a relatively lengthy dissent joined as to parts one through three by Justice O'Connor, initiated his remarks by stating his sim-

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199. *Id.*

200. *Id.*

201. *Id.* at 2880-81. *See generally supra* notes 50-61 and accompanying text (discussing the law of fraud when Congress enacted the mail fraud statute).

202. *McNally,* 107 S. Ct. at 2880-81. Ironically, Justice White cited Hammerschmidt v. United States, 265 U.S. 182 (1924), for support, which stands for the seemingly contrary position that no such property rights deprivation need occur where a conspiracy to defraud the federal government is charged. *See id.; see also supra* note 61. But under another view, Justice White noted, while fraud under the conspiracy statute need not involve an interference with property, fraud under a property rights-protecting law—like, by implication, the mail fraud statute—is "quite another [thing]." *Id.* at 2881 n.8 (quoting Curley v. United States, 130 F. 1, 7 (1st Cir. 1904)). Thus, Justice White left no doubt as to the inapplicability of conspiracy decisions like *Hammerschmidt* in defining mail fraud, even as he cited *Hammerschmidt* for a general proposition regarding common law fraud.

203. *McNally, 107 S. Ct. at 2881.*

204. *Id.*

205. *Id.*

206. *Id.; see also supra* notes 172-84 and accompanying text.

207. *McNally,* 107 S. Ct. at 2881.

208. *Id.*

ple thesis; the mail fraud statute is a broad prohibition of any scheme or artifice to defraud.[209] In support of this position, Justice Stevens briefly surveyed the areas in which various circuit courts of appeals had read the mail fraud statute as prohibiting intangible rights fraud.[210] He asserted that neither the words nor purpose of the statute justified the majority's limiting interpretation of it.[211]

Next, Justice Stevens directed his attention to the language of the statute. Proclaiming himself "at a loss" to understand the basis of the majority's holding,[212] he simply contended that the statute's disjunctive separation of schemes to defraud from those to obtain money or property made it obvious that one could violate one without necessarily violating the other.[213] In support of his contention, Justice Stevens suggested a comparison with *Streep v. United States,*[214] apparently for its implication that schemes to defraud are conceptually distinct from counterfeiting schemes involving the theft of money.[215] However, he made no attempt to argue that *Streep* held that the mail fraud statute criminalized two separate types of fraud.

Justice Stevens asserted next that Congress' purpose in enacting the statute was to prevent misuse of the mails.[216] In this respect, he cited Justice Holmes' broad mail-misuse language from *Badders.*[217] Justice Stevens continued by asking pointedly if, in enacting the mail fraud statute, Congress was willing to tolerate fraudulent infringement of the right to honest politicians and government while it prohibited fraudulent deprivation of money.[218]

In addition, Justice Stevens argued that broad constructions of "to defraud" in the context of federal conspiracy cases should be "virtually dispositive here."[219] In support of this contention, he posited that Congress enacted both statutes at about the same time,[220] suggesting that Congress

209. *Id.* at 2882 (Stevens, J., dissenting).

210. *Id.* at 2883-84 nn.1-5 (Stevens, J., dissenting).

211. *Id.* at 2884 (Stevens, J., dissenting).

212. *Id.* (Stevens, J., dissenting).

213. *Id.* (Stevens, J., dissenting). *But see* Heydenfeldt v. Daney Gold & Silver Mining Co., 93 U.S. 634, 638 (1876) (quoting Gyger's Estate, 65 Pa. 311, 312 (1870)) (strict adherence to technical rules of grammar should not defeat "common sense" interpretation of statute).

214. 160 U.S. 128 (1895).

215. *McNally,* 107 S. Ct. at 2884 (Stevens, J., dissenting); *see also supra* notes 75-80 and accompanying text.

216. *McNally,* 107 S. Ct. at 2884 (Stevens, J., dissenting).

217. *Id.* (Stevens, J., dissenting). But note that, in the process, Justice Stevens disregarded the fact that the 1909 Amendment divested the mail fraud statute of its mail emphasizing language. *See supra* notes 90-92 and accompanying text.

218. *McNally,* 107 S. Ct. 2885 (Stevens, J., dissenting).

219. *Id.* at 2886 (Stevens, J., dissenting).

220. *Id.* (Stevens, J., dissenting).

intended "to defraud" to mean the same thing in each instance. But after acknowledging that, unlike the mail fraud statute, the plain language of the conspiracy statute clearly authorizes broad application, he weakly submitted that, "in any event," the phrase from the mail fraud statute "scheme or artifice to defraud" is expansive.[221]

Justice Stevens then directed his attention to ways in which scholars and the appellate courts had defined and construed "to defraud." He cited several dictionary definitions generally contemporaneous with the enactment of the mail fraud statute that spoke of fraud in broad terms of deceit and deprivation of rights.[222] In addition, he quoted Judge Posner's unsupported dicta[223] from the subsequently vacated *Holzer*[224] case to the effect that common law fraud includes the simple concealment of material information in the context of a fiduciary duty.[225] Justice Stevens summed up his construction of "to defraud" by arguing that the absence of contrary indications in the statute's legislative history, combined with Congress' general expansion of the statute by amendment, indicated that the broad scope afforded mail fraud by the federal circuit courts was appropriate.[226]

Justice Stevens next attacked the majority's application of the rule of lenity.[227] Repeated acceptance of the intangible rights doctrine by the courts of appeals, he argued, "removed any relevant ambiguity" from the statute.[228] Such a judicial validation, he contended, in addition to the fact that the defendants certainly knew that their scheme was unlawful, made for a "strange" application of the rule of lenity.[229]

In essence, Justice Stevens rested his arguments against the majority's construction of "to defraud" and use of the rule of lenity on the combined conclusions of the circuit courts of appeals in accepting intangible rights mail fraud.[230] He offered no Supreme Court decisions or additional evidence of any significance to challenge the majority's premise. Although no one would dispute Justice Stevens' implicit argument that kickback and other such schemes are deserving of criminal sanction, he failed to advance any policy that would counter the majority's unwillingness to authorize federal

221. *Id.* (Stevens, J., dissenting).
222. *Id.* at 2887 (Stevens, J., dissenting).
223. *See supra* note 61.
224. Holzer v. United States, 816 F.2d 304, 307-08 (7th Cir.), *vacated,* 108 S. Ct. 53 (1987).
225. *McNally,* 107 S. Ct. at 2888 (Stevens, J., dissenting).
226. *Id.* at 2888-89 (Stevens, J., dissenting).
227. *Id.* at 2889-90 (Stevens, J., dissenting).
228. *Id.* at 2890 (Stevens, J., dissenting).
229. *Id.* (Stevens, J., dissenting).
230. *See id.* at 2889-90 (Stevens, J., dissenting).

involvement in setting state disclosure and good government standards through an expansive construction of the mail fraud statute.

Finally, dissenting alone in part four, Justice Stevens suggested means by which the majority decision might be limited.[231] First, he noted that Congress simply could negate the decision by amendment.[232] Second, he reasoned that some corrupt officials might still be prosecuted for mail fraud simply because, by depriving their employers of their loyalty, corrupt public fiduciaries also deprive them of services for which they are receiving compensation.[233] Third, Justice Stevens suggested that the agency rule under which a disloyal agent must deliver any proceeds of his disloyalty to his principal could operate to satisfy the majority's requirement that mail fraud liability be based on a taking of money or property.[234] Notwithstanding these possibilities, Justice Stevens concluded solemnly, the majority's decision will immunize many types of fraudulent mail use from prosecution.[235]

III. ASSESSING THE IMPACT OF *MCNALLY*

Already, *McNally* has proven itself an extremely provocative decision. Federal prosecutors concede that it has struck a devastating blow at the prosecution of public corruption,[236] that it will generate appeals,[237] and that it will require the reevaluation of pending mail fraud cases.[238] Some mail fraud scholars have approved the decision,[239] others have condemned it.[240] Legislation to overturn *McNally* is before a House committee on criminal justice;[241] legislation to amend its anticipated effects is before the Senate

231. *McNally,* 107 S. Ct. at 2890 n.10 (Stevens, J., dissenting).

232. *Id.* at 2890 (Stevens, J., dissenting). Regarding the efforts of two legislators to follow this suggestion, see *infra* notes 241-42.

233. *Id.* at 2890 n.10 (Stevens, J., dissenting); *see also infra* note 271 and accompanying text (noting a post-*McNally* order implicitly supporting this theory).

234. *McNally,* 107 S. Ct. at 2890 n.10 (Stevens, J., dissenting); *see also infra* note 270 and accompanying text (noting two post-McNally decisions supportive of this theory).

235. *McNally,* 107 S. Ct. at 2890-91 (Stevens, J., dissenting).

236. *Cf.* Coyle, *U.S. Prosecutors Reel in Wake of Mail Fraud Ruling,* Nat'l L.J., July 20, 1987, at 1, col. 1.

237. *See id.* at 36, col. 3. So far, courts have vacated several mail fraud convictions in light of *NcNally. See, e.g.,* United States v. Mandel, 672 F. Supp. 864, 876 (D. Md. 1987); Ingber v. Enzor, 664 F. Supp. 814, 823 (S.D.N.Y. 1987). *But see* United States v. Callanan, 671 F. Supp. 487, 494 (E.D. Mich. 1987) (denying habeas corpus relief on grounds that *McNally* is not retroactive in collateral attacks).

238. Coyle, *supra* note 236, at 1, col. 1.

239. *Id.* at 36, col. 1.

240. *Id.* at 36, col. 2.

241. *See* H.R. 3089, 100th Cong., 1st Sess. (1987) (introduced by Congressman John Conyers for purpose of amending United States Code to include intangible rights in the definition of "fraud" wherever it appears). At this writing, H.R. 3089 is before the House Committee on the Judiciary, Subcommittee on Criminal Justice, which has yet to act upon it.

Rules and Administration Committee.[242] Beyond these immediate reactions, however, the projected impact of the *McNally* rule, in several areas, is reasonably certain.

A. McNally *and Private Fiduciary Intangible Rights Fraud*

Private sector fiduciaries charged with mail fraud will argue that *McNally*'s reasoning regarding public fiduciaries applies equally to their cases. Such efforts probably will succeed. In both the public and private sector contexts, the theory is predicated on the deprivation by a fiduciary of his cestui's intangible right to the fiduciary's uncorrupted services.[243] Therefore, whether the fiduciary is a public servant or private individual is immaterial when, as *McNally* indicates, the mail fraud statute does not protect the compromised intangible right.[244] As it does those in the public trust, *McNally* should immunize many private fiduciaries from mail fraud prosecution under the intangible rights doctrine.[245]

B. McNally *and Wire Fraud*

The wire fraud statute[246] is patterned after the mail fraud statute and courts have construed it identically with respect to intangible rights fraud.[247] Consequently, to the extent that *McNally* bars certain intangible rights mail fraud prosecutions, it should preclude further application of the doctrine of intangible rights wire fraud as well.[248]

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242. *See* S. 1837, 100th Cong., 1st Sess. (1987) (introduced by Senator Mitch McConnell for purpose of clearly defining and strengthening federal authority over government corruption and election fraud). At this writing, the Rules and Administration Committee has not acted upon S. 1837.

243. *See supra* notes 104-70 and accompanying text (discussing intangible rights theory in both public and private sector forms).

244. In fact, the Supreme Court has remanded the mail fraud conviction of a private fiduciary for further consideration in light of *McNally*. *See* United States v. Price, 788 F.2d 234 (4th Cir. 1986), *vacated sub nom.* McMahan v. United States, 107 S. Ct. 3254 (1987).

245. *McNally* will not protect, however, private fiduciaries trading securities on nonpublic information. In that context, the Court has deemed such confidential information a property interest that is protected by the mail and wire fraud statutes. *See* Carpenter v. United States, 108 S. Ct. 316, 320 (1987). Although *Carpenter* rested any doubts raised by *McNally* as to the continued vitality of mail and wire fraud prosecutions of corrupt securities traders, it really adds little that is new to the *McNally* rule. In fact, the *Carpenter* conclusion that the cestui's right to exclusive use of his information is protected by the mail and wire fraud statutes, *id.* at 320-21, essentially restated the *McNally* Court's articulation of the same theory. *See* McNally v. United States, 107 S. Ct. 2875, 2882 (1987) (absence of charge that fraud victim be deprived of control over its money was one reason why mail fraud jury instructions were erroneous).

246. 18 U.S.C. § 1343 (1982); *see also supra* note 130 (quoting relevent text of the statute).

247. *See* Note, *supra* note 130, at 1429 n.8.

248. To date, at least three wire fraud convictions have been reversed in light of *McNally*.

C. McNally *and Bank Fraud*

Congress modeled the language of the federal bank fraud statute[249] directly after the language of the mail fraud statute.[250] In light of *McNally*, the bank fraud statute cannot be construed to protect intangible rights any more than the mail and wire fraud statutes can.[251]

D. McNally *and the Hobbs Act*

The Hobbs Act,[252] among other things, prohibits any interference with commerce by extortion.[253] The statute defines extortion as the obtaining of property from another person by any of several specified inducements.[254] In recent years, however, ignoring legislative history indicative of a contrary congressional intent,[255] courts have relaxed the Act's "property" require-

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See United States v. Gimbel, 830 F.2d 621, 627 (7th Cir. 1987); United States v. Herron, 825 F.2d 50, 58 (5th Cir. 1987).

249. 18 U.S.C. § 1344 (Supp. II 1984). Section 1344 provides, in relevant part:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice—(1) to defraud a federally chartered or insured financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by or under the custody or control of a federally chartered or insured financial institution . . . .

Id.

250. *See* S. REP. No. 225, 98th Cong., 2d Sess. 377, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3517, 3519 (bank fraud statute modeled on mail and wire fraud statutes, which reach a "wide range" of activity).

251. Although Congress patterned the bank fraud statute after the mail fraud statute, it did not address the potential for an intangible rights dimension to the bank fraud statute. It follows, therefore, that Congress did not intend its enactment of the bank fraud statute implicitly to endorse judicial reliance on the intangible rights mail fraud theory. Nevertheless, one commentator has suggested that Congress already had given the intangible rights doctrine its tacit assent. *See* Coffee, *supra* note 15, at 123 n.34.

252. 18 U.S.C. § 1951 (1982). Section 1951 provides, in relevant part:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined . . . .
>
> . . . .
>
> (2) The term "extortion" means the obtaining of property from another . . . .

Id.

253. *Id.*

254. *Id.*

255. To all appearances, Congress did not intend that the Hobbs Act protect noneconomic interests. The bill's sponsor, for example, submitted that "[r]acketeering . . . is a fraudulent scheme or unlawful method to gain money or other transferable materials." 89 CONG. REC. 3218 (1965) (statement of Rep. Hobbs). Another representative described robbery under the Act as "the taking of tangible property away from some person, or things from persons . . . ." 91 CONG. REC. 11,920-21 (1969) (statement of Rep. LaFollette). These remarks are representative of recorded congressional views on the proposed Act.

ment and deemed it satisfied by the deprivation of an intangible right.[256] In this respect, the Hobbs Act has operated in much the same way as the mail fraud statute had before *McNally.*[257]

In light of this pre-*McNally* symmetry of statutory application, it is probable, for two reasons, that *McNally* effectively will reduce the reach of the Hobbs Act, or at least confine it to its present scope. First, the *McNally* Court's deflation of the pure intangible rights mail fraud theory directly challenges the underpinnings of the intangible property rights theory under the Hobbs Act.[258] Second, the *McNally* Court reemphasized the judicial duty strictly to construe ambiguous penal statutes; and arguably, the Hobbs Act is an ambiguous statute.[259] Accordingly, courts should proceed with caution in this area.

E. McNally *and RICO*

The Racketeer Influenced and Corrupt Organizations Act (RICO)[260] is a unique part of the federal criminal code in that it creates no new offense. Rather, it prohibits patterns of illegal activity as defined by twenty-four separate crimes.[261] Mail fraud, wire fraud, and Hobbs Act violations are all predicate crimes under RICO.[262] To the extent that *McNally* narrows in scope the several predicate offenses discussed above, it likewise narrows the

256. *See, e.g.,* United States v. Local 560 of the Int'l Brotherhood of Teamsters, 780 F.2d 267, 278 (3d Cir. 1985), *cert. denied,* 106 S. Ct. 2247 (1986); United States v. Zemek, 634 F.2d 1159, 1174 (9th Cir. 1980), *cert. denied,* 450 U.S. 916 (1981).

257. In fact, prior to *McNally,* the two laws experienced nearly parallel judicial expansion as anti-corruption provisions. *Cf.* Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy,* 65 GEO. L.J. 1171 (1977) (discussing use of Hobbs to prosecute local corruption in the federal courts).

258. Like the intangible rights mail fraud doctrine, the theory of intangible property rights under the Hobbs Act arguably is contradicted by the Act's legislative history. *See supra* note 255 and accompanying text.

259. Evidence of this ambiguity exists in the fact that judges and legislators have taken manifestly conflicting views on the statute. *See supra* notes 255-56 and accompanying text.

260. 18 U.S.C. § 1961 (1982) [hereinafter RICO]. Section 1961 provides, in relevant part:

> "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), . . . section 1951 (relating to interference with commerce, robbery, or extortion) . . . .

Id.

261. *See id.*

262. *Id.*

operation of RICO.[263]

F. Alternate Prosecutorial Practices After McNally

The *McNally* majority's distinction between the conspiracy and mail fraud statutes[264] indicates that an intangible rights theory remains viable where a scheme to defraud the federal government itself is provable. This distinction could provoke increased reliance on the conspiracy statute for prosecuting corruption. To what extent United States attorneys can prove that joint acts of corruption defraud the United States government, however, remains to be seen.

Apart from this conspiracy theory, however, part four of Justice Stevens' dissent contained two alternative theories under which mail fraud prosecutions of corrupt officials might continue after *McNally*.[265] The majority neither responded to, nor deflected, either theory. Under Justice Stevens' first approach,[266] a public servant's breach of duty is attended by a financial loss to his employer, who is not getting what he paid for.[267] Justice Stevens' second proposition was that a tangible benefit to the disloyal fiduciary may exist, under general agency principles, where the fiduciary receives proceeds as a result of his breach of duty and does not forward them to his employer.[268] Thus, Justice Stevens suggested that federal prosecutors might still meet the majority's "money or property" requirement in cases that previously would have been presented under the intangible rights theory, such as those involving kickback schemes.[269]

So far, at least two federal circuits have expressed acceptance of Justice Stevens' agency theory of mail fraud.[270] In another circuit, however, a district court preserved a large scale mail fraud prosecution of several public servants without recourse to rules of agency.[271] Without a doubt, prosecu-

263. In this regard, see United States v. Mandel, 672 F. Supp. 864, 876 (D. Md. 1987) (vacating mail fraud and related RICO convictions in light of *McNally*).

264. *See supra* note 202.

265. *See* United States v. McNally, 107 S. Ct. 2875, 2890 n.10 (1987) (Stevens, J., dissenting, joined by O'Connor, J., in parts one and three only).

266. *Id.* at 2882.

267. *Id.* at 2890 n.10.

268. *Id.* (citing the RESTATEMENT (SECOND) OF AGENCY § 403 (1958)).

269. *Id.*

270. *Accord* United States v. Runnels, 833 F.2d 1183, 1186-88 (6th Cir. 1987) (union official's failure to forward kickback-scheme proceeds to union constituted a property deprivation); *see* United States v. Fagan, 821 F.2d 1002, 1010 n.6 (5th Cir. 1987) (employee's failure to forward kickback-scheme proceeds to employer constituted a property deprivation).

271. *See* United States v. Doherty, 675 F. Supp. 726, 735 (D. Mass. 1987) (government's indictment and proof sufficient notwithstanding *McNally*).

tors will press this agent accountability theory in the future.[272] At this point, however, whether the balance of the federal circuits will adopt the theory also remains to be seen.

IV. CONCLUSION

The *McNally* majority's conclusion that jury instructions following a mail fraud trial are erroneous when they fail to require a finding of a property right deprivation represents a practical compromise. On one hand, the Court's use of the rule of lenity to deflate an expanding judicially-created doctrine should give pause to jurists too quick to disregard principles of notice, separation of powers, and federalism in validating novel prosecutorial theories. On the other hand, the decision leaves open a window through which carefully pled prosecutions of corrupt fiduciaries may yet pass. In this way, *McNally* affirms fundamental constitutional values without completely foreclosing the possibility of federal prosecutions of corrupt fiduciaries.

The lower federal courts presently are resolving the implications of *McNally* on a case-by-case basis. In the meantime, unless Congress revives the intangible rights doctrine through legislation, it will remain as the *McNally* court left it: a dead letter.

John J. O'Connor

272. In fact, the Supreme Court's recent indirect validation of Justice Stevens' theory, in the context of an insider trading scheme, *see* Carpenter v. United States, 108 S. Ct. 316, 321 (1987) (quoting Diamond v. Oreamuno, 24 N.Y.2d 494, 497, 248 N.E.2d 910, 912, 301 N.Y.S.2d 78, 80 (1969)), makes it certain that United States attorneys will rely on the theory at least in mail/securities fraud cases like *Carpenter*.